



STATE OF WASHINGTON
ENVIRONMENTAL AND LAND USE HEARINGS OFFICE

Mailing Address: PO Box 40903, Olympia, WA 98504-0903
Physical Address: 1111 Israel Rd SW, Suite 301, Tumwater, WA 98501

September 17, 2019

Sent by Email and US Mail

David Alvarez
Chief Civil DPA
Clallam Prosecuting Attorney
233 East Fourth St. Ste 11
Port Angeles WA 98362

Thomas J. Young, Senior Counsel
Phyllis J. Barney, AAG
State of Washington, Department of Ecology
PO Box 40117
Olympia WA 98504-0117

Re: **PCHB No. 19-044**
CLALLAM COUNTY v. STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY

Dear Parties:

Enclosed is an Order Denying Motion to Stay.

The Board notes that Clallam County states in its motion that it wishes to mediate regardless of the Board's decision on its motion for stay. The Board encourages the parties to negotiate as the case proceeds, and contact the Board if parties wish to participate in Board assisted mediation.

If you have any questions, please feel free to contact the staff at the Environmental and Land Use Hearings Office at 360-664-9160.

Sincerely,

Carolina Sun-Widrow, Presiding
Administrative Appeals Judge

CSW/le/P19-044
Encl.

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the attorneys of record herein.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.
DATED 9/17/19, at Tumwater, WA.

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

CLALLAM COUNTY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 19-044

ORDER DENYING MOTION TO STAY

Clallam County appealed the Western Washington Phase II Municipal Stormwater National Pollutant Discharge Elimination System General Permit (Permit) issued by the Department of Ecology (Ecology). Clallam County filed a motion requesting that the Pollution Control Hearings Board (Board) stay the applicability of the Permit to the Port Angeles Urban Growth Area, located in unincorporated Clallam County. Ecology opposed the request for a stay.

The Board considering the motion was comprised of Board Chair Kay M. Brown, and Members Neil L. Wise and Joan M. Marchioro.¹ Deputy Prosecuting Attorney David W. Alvarez represented Clallam County. Senior Counsel Thomas J. Young and Assistant Attorney General Phyllis J. Barney represented Ecology.

In ruling on the stay, the Board considered the following materials:

¹ Two members of the Board constitutes a quorum for making a decision and may act even though one position of the Board is vacant or one board member is unavailable. WAC 371-08-330(2). Board member Marchioro participated in the Board discussion on the motion, but was unavailable to review and sign the final order.

1. Clallam County's Motion Requesting a Stay;
2. Declaration of Ross Tyler in Support of Motion to Stay;
3. Declaration of Carol Creasey in Support of Motion to Stay;
4. Declaration of Mark Ozias in Support of County's Motion to Stay;
5. State of Washington, Department of Ecology's Response in Opposition to Motion Requesting a Stay;
6. Declaration of Thomas J. Young in Support of Department of Ecology's Response in Opposition to Motion Requesting a Stay, with Exhibits 1-8; and
7. Clallam County's Brief #2 in Support of its Motion Requesting a Stay [Reply].

Based upon the evidence submitted and the written materials filed, the Board enters the following decision:

BACKGROUND

Ecology reissued the Permit on July 1, 2019, with an effective date of August 1, 2019. The Permit authorizes discharge of stormwater to surface and ground waters of the state from municipal separate storm sewer systems (MS4s) owned by permittees, subject to compliance with the Permit's terms and conditions. Clallam County has not been a permittee under previous iterations of the Permit; however, the instant Permit requires Clallam County to apply for coverage with respect to the area in the county known as the Port Angeles Urban Growth Area (PAUGA). *See* Notice of Appeal, Attach. 1, Condition S1.D.2.b.1.

1 In making its decision that the PAUGA should be covered under the Permit, Ecology
2 evaluated six, nonexclusive factors taken from a federal regulation. Young Decl., Ex. 2, Ex. 5, p.
3 2, Ex. 6. The federal regulation required Ecology to develop criteria and a process for
4 determining when MS4s are subject to coverage under the Permit. *See* 40 C.F.R. § 123.35(b);²
5 Young Decl., Ex. 2. A 2007 Ecology document outlining the process to determine whether
6 additional geographical areas should be covered under the Permit states that Ecology may, in its
7 discretion, rely on other factors besides the six enumerated ones, and that the factors are not
8 intended to restrict Ecology's exercise of its discretion. Young Decl., Ex. 2, p. 1.

9 Clallam County appealed the Permit on July 30, 2019. The appeal challenged only the
10 requirement that Clallam County obtain coverage under the Permit with respect to the PAUGA,
11 and requested three items of relief: 1) a stay of the application of the Permit to the PAUGA until
12 conclusion of the appeal, 2) an order reversing Ecology's decision requiring coverage under the
13 Permit for the PAUGA, and 3) Board sponsored mediation, subject to Ecology's consent to
14 participate in mediation. A day after filing the appeal, Clallam County filed the motion to stay.
15 Ecology opposes the motion to stay.

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20 ² The federal regulation recommended a balanced consideration of the following six factors in determining whether
21 small MS4s should be covered under the Permit: discharge to sensitive waters, high growth or growth potential,
high population density, contiguity to an urbanized area, significant contributor of pollutants to waters of the United
States, and ineffective protection of water quality by other programs. 40 C.F.R. §123.35(b)(1)(ii).

1 ANALYSIS

2 A. Stay Standard

3 The Board is authorized to stay the effectiveness of an order until a decision is rendered
4 on the merits. RCW 43.21B.320(3); WAC 371-08-415. The requirements for obtaining a stay
5 from the Board are:

6 (4) The requester makes a prima facie case for a stay if the requester demonstrates
7 either a likelihood of success on the merits of the appeal or irreparable harm.

8 Upon such a showing, the board shall grant the stay unless the agency
9 demonstrates either:

10 (a) A substantial probability of success on the merits; or

11 (b) Likelihood of success and an overriding public interest, which justifies denial
12 of the stay.

13 WAC 371-08-415(4).

14 A stay is akin to a preliminary injunction intended to preserve the status quo and prevent
15 irreparable loss of rights before the judgment. *Coal. to Protect Puget Sound Habitat v. Dep't of*
16 *Ecology*, PCHB No. 14-047, p. 6 (June 23, 2014). An injunction is an extraordinary equitable
17 remedy designed to prevent serious harm. *Kucera v. Dept. of Transportation*, 140 Wn.2d 200,
18 995 P.2d 63 (2000) (quoting *Tyler Pipe Indus. v. Dept. of Revenue*, 96 Wn.2d 785, 638 P.2d
19 1213 (1982)). The party moving for a stay must show, at a minimum, that the status quo must be
20 maintained until a decision is made upon the merits. Evaluation of the likely outcome on the
21 merits is based on a sliding scale that balances the comparative injuries that the parties and
nonparties may suffer if a stay is granted or denied. *Coal. to Protect Puget Sound Habitat*,
PCHB No. 14-047, p. 5.

1 The Board concludes that Clallam County has not made a prima facie showing of either a
2 likelihood of success in challenging Ecology's decision to require coverage, or irreparable harm
3 anticipated from being subject to the Permit during the appeal period.

4 **1. Likelihood of Success on the Merits**

5 Clallam County argues that it is likely to succeed on the merits of its appeal because
6 Ecology exceeded its authority by evaluating the six factors in the 2007 guidance document for
7 determining coverage under the Permit when the factors have not been subject to rulemaking
8 under the Administrative Procedure Act (APA), ch. 34.05 RCW. However, the Board has
9 consistently ruled that it lacks authority to determine whether standards, manuals, or other
10 materials incorporated into the municipal stormwater general permit and other general permits
11 violate the APA rulemaking process. *See, e.g., Copper Dev. Ass'n, Inc. v. Dep't of Ecology*,
12 PCHB Nos. 09-135 through 09-141, p. 15 (Jan. 5, 2011) (Board lacked authority to determine
13 claim that Ecology violated the APA by including numeric benchmarks for copper, zinc, and
14 turbidity in the industrial stormwater general permit without following APA rulemaking
15 procedures); *Puget Soundkeeper Alliance v. Dep't of Ecology*, PCHB Nos. 07-022 & 07-023, pp.
16 17-21 (Sept. 29, 2008) (Board lacked authority to determine claim that stormwater management
17 manuals referenced in earlier iteration of Western Washington Phase II Municipal Stormwater
18 General Permit should have been adopted as rules under the APA).

19 Clallam County further argues that even assuming that the factors were valid tools that
20 Ecology was authorized to consider, Ecology arbitrarily and capriciously applied the factors in
21 arriving at its coverage determination. Agency action is arbitrary and capricious if it is willful

1 and unreasoning and taken without regard to the attending facts or circumstances. Where there
2 is room for two opinions, an action taken after due consideration is not arbitrary and capricious
3 even though a reviewing tribunal may believe it to be erroneous. *Hillis v. State, Dep't of*
4 *Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). Here, both parties offer competing
5 arguments and declarations that application of the six, nonexclusive factors in determining
6 coverage under the Permit support their respective positions. Based on the argument and
7 evidence presented thus far, Clallam County has not met its prima facie case of demonstrating
8 likelihood of prevailing on its claim that Ecology acted arbitrarily and capriciously in making its
9 coverage decision.

10 **2. Irreparable Harm**

11 Clallam County also failed to show that irreparable harm would occur from being subject
12 to Permit coverage during the course of this appeal. Although Clallam County states that it
13 would need to expend resources to implement the Permit if it is subjected to coverage, the Board
14 has not considered the expenditure of funds to constitute irreparable harm under the stay
15 regulations. *See, e.g., Martig Engineering and Seashore Villa Mobile Home Park v. Dep't of*
16 *Ecology*, PCHB No. 03-013, p. 4 (March 28, 2003); *McClary Columbia Corp. v. Ecology*, PCHB
17 No. 01-147, p. 3 (March 12, 2002).

18 In sum, Clallam County has not made the requisite showing necessary for obtaining a
19 stay of Ecology's Permit coverage decision under WAC 371-08-415(4).

20 Based on the foregoing analysis, the Board enters the following:


21 **ORDER**

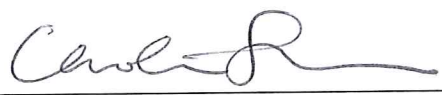
1 Clallam County's Motion Requesting a Stay of the applicability of the Western
2 Washington Phase II Municipal Stormwater National Pollutant Discharge Elimination System
3 General Permit on the Port Angeles Urban Growth Area is DENIED.

4 SO ORDERED this 17th day of September, 2019.

5 **POLLUTION CONTROL HEARINGS BOARD**

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7 
8 KAY M. BROWN, Board Chair

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10 NEIL L. WISE, Member

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12 CAROLINA SUN-WIDROW, Presiding
13 Administrative Appeals Judge